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VIA E-MAIL:

March 30, 2009

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Docket No. R-1343 – Proposed Rule to Amend Regulation E for Overdraft Protection Plans

Dear Ms. Johnson:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the Federal Reserve Board's (Board's) proposed rule that will amend Regulation E, the Electronic Fund Transfer (EFT) Act, to provide consumers with certain protections relating to the assessment of overdraft fees. These changes will apply to automated teller machine (ATM) transactions and one-time debit card overdrafts, but will not apply for other types of transactions, such as checks, automated clearinghouse (ACH) transactions, and preauthorized EFTs. The proposed rule will also prohibit financial institutions from assessing an overdraft fee if the overdraft would not have occurred but for a debit hold that was placed on funds in an amount exceeding the actual transaction, unless the merchant can determine the actual transaction amount within a short period of time after authorization. CUNA represents approximately 90 percent of our nation's 8,000 state and federal credit unions, which serve approximately 92 million members.

Summary of CUNA's Comments

- CUNA generally supports the proposal that will amend Regulation E to provide protections relating to the assessment of overdraft fees for ATM and one-time debit card transactions. Although CUNA does not specifically oppose an "opt-in" approach in which fees could not be charged unless the consumer chooses to participate in the plan, we strongly urge the Board to adopt a hybrid approach, in which financial institutions would be able to continue to use an opt-out system for existing accounts, while the opt-in alternative would be required for new accounts. This will alleviate burdens for credit unions in making this transition, while insuring that the opt-in alternative will become more prevalent over time as new accounts are opened.

- CUNA agrees that financial institutions should not require consumers to choose overdraft services for checks, ACH, and other transactions on the condition that they elect this service for ATM and one-time debit card transactions. However, these and other operational aspects of the rule will require significant time to implement and, therefore, credit unions will need at least one year after the proposal is finalized to implement these changes and compliance with this rule should not mandatory until that time.
- CUNA supports the provisions of the rule that suggest 30 days as being a reasonable amount of time for consumers to respond to an opt-out notice, which is consistent with similar provisions under the privacy rules that allow consumers to opt-out of information sharing.
- CUNA opposes a requirement that credit unions provide consumers with a toll-free telephone number as a means to opt-out of the overdraft program, which will be very expensive, especially for smaller credit unions.
- CUNA would not oppose a requirement to provide consumers who elect not to participate in the overdraft program with an account that is exactly the same as for those who do participate, as credit unions already provide such accounts.
- CUNA opposes the requirement that opt-out notices should be segregated from other disclosures, as this is unnecessary as long as these notices are clear and conspicuous.
- CUNA opposes the provisions to require additional opt-out notices on periodic statements when overdraft fees are assessed. This requirement would be very burdensome for credit unions, with few benefits for consumers who will not notice or ignore this additional information. If additional notices are necessary, we believe these should only be provided annually, similar to the privacy rules that require annual privacy notices, as long as there is no requirement to send this as a separate disclosure or in a separate mailing.
- We support allowing consumers to revoke an opt-out request orally by telephone or in person as this will be convenient for consumers without imposing significant burdens for credit unions.
- Under the proposal, the prohibition on overdraft fees in connection with debit holds will not apply if the institution adopts procedures designed to release the hold within a “reasonable” period of time, and the rule provides that two hours will be considered reasonable. We believe this timeframe is too short for those credit unions that may batch these transactions.
- Merchants should be subject to additional rules that require them to submit debit card transactions promptly for settlement as this will significantly reduce the overall amount of overdraft fees that are assessed as a result of debit holds.

Discussion

<u>Opt-in and Opt-out Alternatives</u>

The proposed rule outlines two approaches for providing consumers a choice regarding the payment of ATM and one-time debit card overdrafts by their financial institution. One is the “opt-out” alternative that would prohibit an institution from imposing an overdraft fee, unless the consumer is given an initial notice and a reasonable opportunity to opt-out of the institution’s overdraft service, and the consumer does not opt-out. The other approach is the “opt-in” alternative that would prohibit an institution from imposing an overdraft fee for paying such overdrafts, unless the consumer affirmatively consents to the institution’s overdraft service.

CUNA supports the Board’s proposal to include these regulatory changes for overdraft protection plans under Regulation E. In general, we believe overdraft protection plans can provide a valuable service for consumers, especially for check transactions, as the overdraft fee is often equivalent to the returned-check fee and the use of the overdraft plan will avoid additional merchant fees and other adverse actions.

However, we are sensitive to the concerns that overdraft plans may not always be appropriate for one-time debit card and ATM transactions, as they are often low dollar transactions and there are no external adverse consequences that result from the overdraft, such as additional fees or other actions against the consumer. In these situations, consumers may not want to pay the overdraft fee since the only adverse consequence is the inability to complete the transaction.

For these reasons, we would not specifically oppose an opt-in approach for these transactions, and many credit unions already use an opt-in system. In fact, implementing an opt-in approach may be less burdensome for some credit unions as it could reduce the extent to which records would need to be maintained, as compared to keeping records on members who have opted out of the plan under the opt-out alternative. The opt-in alternative will also alleviate institutions from the burden of providing additional notices on periodic statements whenever the consumer incurs a fee, which would be required under the proposed opt-out alternative.

However, we strongly urge the Board to adopt a hybrid approach, in which financial institutions would be able to continue to use an opt-out system for existing accounts, while the opt-in alternative would be required for new accounts. This has the potential to reduce operational burdens for credit unions, while insuring an orderly transition that, over time, will result in an opt-in system for more and more consumers as new accounts are opened in the future.

Also, not all credit unions would choose to implement the hybrid approach. A number of credit unions already provide an opt-in option for all accounts, and they would likely continue to do so. Other credit unions may likely choose to provide the opt-in alternative for all accounts at the same time if they decide this is in the best interest of their members or if they recognize that the burdens of implementing this option are less than those associated with providing the opt-out alternative for existing accounts.

Although other credit unions may ultimately decide to choose the opt-out alternative for existing accounts, we believe they will seriously consider the opt-in alternative for all accounts before making this decision. Credit unions are well aware of the belief by some that the opt-out alternative does not provide adequate protections for consumers.

Under the proposal, a financial institution will not be allowed to condition the right to opt-out of the overdraft service for ATM and debit card transactions on the consumer also opting out of the service for checks, ACH, and other transactions. Under the opt-in alternative, the proposed rule will prohibit the institution from conditioning the payment of overdrafts for checks, ACH, and other transactions on the consumer opting in to the payment of overdrafts for ATM and debit card transactions. We generally agree with this proposed approach since requiring the payment of overdrafts for checks, ACH, and other transactions on the condition that the consumer use the overdraft plan for ATM and debit card transactions would undercut one of the goals of the proposal, which is to allow consumers to continue to receive the benefits of overdraft protection plans for check and ACH transactions if they choose.

However, a number of credit unions have indicated that it would be a significant operational burden to allow consumers to target their use of overdraft protection plans in this manner. Credit unions will, therefore, need a significant amount of time to implement the changes that will be needed in order to provide consumers with the ability to target their use of overdraft protection plans and to implement the other changes required under this rule. For these reasons, credit unions will need at least one year after the proposal is finalized to implement the necessary changes and compliance with this rule should not be mandatory until that time.

In conjunction with the proposal, the Board has requested comments on a number of issues with regard to the opt-out and opt-in alternatives. For the opt-out alternative, the Board has suggested that thirty days is a reasonable amount of time for consumers to respond when they receive the opt-out notice, but has requested comment as to whether a shorter period of time would be preferable. For the initial opt-out notice, the financial institution may not charge a fee during this time period, and we support the proposed 30-day period, both because it provides a sufficient period of time and because it is consistent with the rules for the annual privacy notices in which certain information cannot be shared until the consumer has a reasonable opportunity to opt-out of the information sharing, which again is thirty days. We believe this consistency will facilitate compliance if the Board adopts the opt-out alternative.

The Board has also requested comment as to whether financial institutions should be required to provide consumers with a toll-free telephone number as a means to opt-out of the overdraft program and whether the Board should provide examples of opt-out methods that would not be acceptable, such as requiring the consumer to write a letter. We agree that the Board should provide examples of prohibited opt-out methods as this will help facilitate compliance with these rules, but we strongly disagree with the toll-free telephone number requirement. Many credit unions, especially smaller ones, do not have the funds to maintain a toll-free telephone number. In the current economic climate, credit unions are carefully reviewing their budgets for necessary cost savings and requiring a toll-free telephone number under these circumstances would severely hamper these efforts.

The proposal includes two alternatives for implementing either the consumer's choice to opt-out or not opt-in to the overdraft plan. One would require institutions to provide these consumers with an account with the same terms, conditions, rates, fees, and features, absent the overdraft protection plan. The other is to offer a similar account, as long as the differences are not so substantial as to discourage the consumer from opting out of the plan or to compel the consumer to opt-in. Credit unions will likely provide their members with the exact same account, with the difference being that the overdraft feature will not be provided to those members who opt-out of the plan or choose not to opt-in. For this reason, we would not oppose the provisions in the proposal that would require accounts with the same terms, conditions, rates, fees, and features.

In the proposal, the Board requested comment as to whether the opt-out notice should be segregated from other disclosures to ensure the notice will be seen by the consumer. We oppose any requirement to segregate these disclosures. We are concerned that such a requirement may be interpreted as requiring a separate mailing, which would be very costly and, again, would affect credit unions' abilities to manage their budgets during these difficult economic times. We see no reason why these notices cannot be incorporated with other mailings, as long as they are disclosed in a clear and conspicuous manner, which is permitted under most other disclosure requirements.

Although we support the requirement to give consumers a notice that provides them the right to opt-out at the time the overdraft service is first offered to them, we strongly oppose the provisions that will require credit unions and other financial institutions to also provide an additional opt-out notice during any periodic statement period in which the service is used, whether it is provided on the periodic statement or in a separate notice. Such a requirement will simply be too burdensome for credit unions and the information provided, in combination with the other significant disclosures provided on the periodic statements, will be too overwhelming for members, who will likely ignore this additional information.

This burden could be alleviated by allowing financial institutions to provide the opt-out notice on every periodic statement, regardless of whether the service is used during that time period. This would be preferable than requiring institutions to determine which periodic statement period these fees were incurred and providing notices only on those statements. This would also alleviate the burden of having to determine which fees are associated with check and ACH overdrafts, which do not require notices, as opposed to fees associated with ATM and one-time debit card transactions. However, providing the information on each periodic statement will only increase the risk that consumers will ignore this information, while imposing significant burdens for credit unions, which include higher postage and processing costs.

For this reason, we believe the requirement to provide these additional opt-out notices will provide very few benefits for consumers, while resulting in significant burdens for credit unions and other financial institutions, regardless of whether the notice is on every periodic statement or just on those in which fees are incurred. If the Board continues to believe that providing the right to opt-out at the time the overdraft service is first offered is not sufficient and additional notices are still necessary, then we suggest the Board only require that financial institutions provide an additional opt-out notice once each year, instead of on each periodic statement in which the service is used. However, we would only support this approach if the annual notice could be included with other information, as opposed to it being a separate disclosure or requiring it to be provided in a separate mailing.

This is similar to the annual privacy notice requirements under the Gramm-Leach-Bliley Act and while we believe these privacy notice requirements are also unnecessary, an annual opt-out notice would be far preferable for both financial institutions and consumers than the current proposal. Notwithstanding an annual or other notice requirement, credit unions will always honor a request from a member who decides at any time that he or she no longer wants to participate in the overdraft program, regardless of when the request is received.

The proposed rule will require financial institutions to comply with a consumer's opt-out request as soon as "reasonably practicable" after it is received, and the Board has requested comment as to whether more guidance is needed. We do not believe specific guidance is needed as this will depend on a number of factors, including the system that the credit union uses for processing these requests. However, we believe credit unions should generally be able to process these requests by the end of the next business day after the business day in which the request is received. Processing opt-out requests should be similar to processing stop payment requests for checks and §4-303 of the Uniform Commercial Code requires stop payment orders to be processed within this timeframe.

The Board has also requested comment as to whether a consumer should be permitted to revoke the opt-out request orally, either by telephone or in-person. We believe consumers should be able revoke their opt-out request in this manner. Providing these options will be convenient for consumers, without imposing significant additional burdens on credit unions.

Debit Hold Provisions

Under the proposed rule, the prohibition on overdraft fees in connection with debit holds will not apply if the institution adopts procedures designed to release the hold within a “reasonable” period of time, and the rule provides that two hours will be considered reasonable. We are concerned about this proposed timeframe, especially for smaller credit unions that may batch these transactions, in which case they only receive the information during certain times throughout the day. For this reason, we believe two hours is not sufficient and a longer period of time should be considered “reasonable” under this rule in order to address the concerns of those who batch these transactions.

However, the significant overall problem with debit holds is that financial institutions have little control over the holds placed by merchants and are unable to determine the exact amount of the transaction or control how long the hold is in place. Although the prohibition on overdraft fees will only apply in situations in which the merchant can determine the actual transaction within a short period of time after authorization, we believe merchants should be subject to additional rules that require them to submit debit card transactions promptly for settlement as this will significantly reduce the overall amount of overdraft fees that are assessed as a result of debit holds. As part of this process, the Board should meet with processors and financial institutions to further discuss these issues and CUNA looks forward to participating in these efforts.

Thank you for the opportunity to comment on the proposed rule that will amend Regulation E. If you have questions about our comments, please contact Senior Vice President and Deputy General Counsel Mary Dunn or me at (202) 638-5777.

Sincerely,
Jeffrey P. Bloch
Senior Assistant General Counsel